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IN THE
Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISERS, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND TEXAS COALITION OF CITIES FOR UTILITIES ISSUES

Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, BRAND X INTERNET SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CROSS-RESPONDENT, THE UTILITY, CABLE & TELECOMMUNICATIONS COMMITTEE OF THE CITY COUNCIL OF NEW ORLEANS IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it affirmed the FCC's conclusion that cable modem service is not a "cable service" within the meaning of Title VI of the Communications Act, 47 U.S.C. § 522(6).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent, the Utility, Cable & Telecommunications Committee of the City Council of New Orleans, states the following:

The New Orleans City Council is the legislative branch of local government for the City of New Orleans. The Utility, Cable & Telecommunications Committee of the City Council of New Orleans oversees the City Council's regulatory authority over utility, cable and telecommunication matters and makes recommendations to the full City Council concerning rates and services. As a result, the Utility, Cable & Telecommunications Committee of the City Council of New Orleans does not have a parent corporation.

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OPINION AND ORDER BELOW

This Brief in Support of the Conditional Cross-Petitioners' Writ of Certiorari incorporates by reference the "Opinions Below" section of the Petition for Writ of Certiorari in No. 04-277 (FCC Petition).[1]

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[1] Copies of the Federal Communications Commission's Declaratory Ruling and the Ninth Circuit's Opinion are reproduced in the Appendix to the FCC Petition and are not reproduced here. References to the FCC Petition will be cited as "FCC Pet." References to the Appendix to the FCC Petition will be cited as "FCC App." References to the Conditional Cross-Petition will be cited as "Cross Pet." References to the Appendix to the Conditional Cross-Petition will be cited as "Cross Pet. App."

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on October 6, 2003. Cross-Petitioners filed a timely Petition for Rehearing on November 19, 2003, which the Court of Appeals denied on March 31, 2004. On June 16, 2004, Justice O'Connor extended the time for filing a Petition for Certiorari through July 29, 2004 and on July 20, 2004 again extended the time for filing until August 30, 2004. The FCC Petition was filed on August 27, 2004, the NCTA Petition was filed on August 30, 2004 and the response date for each was set as September 30, 2004. On September 30, 2004, the National League of Cities, National Association of Telecommunications Officers and Advisors, United States Conference of Mayors, National Association of Counties, and Texas Coalition of Cities for Utilities Issues, filed a Conditional Cross-Petition for Writ of Certiorari, which was placed on this Court's docket on October 5, 2004. This Court has jurisdiction over the Cross-Petition under 28 U.S.C. § 1251 (1) and Rules 12.5 and 13.4 of this Court. This Court has jurisdiction over this Brief in Support of the Conditional Cross-Petition pursuant to Rules 12.5 and 6 of this Court.

STATEMENT OF THE CASE

On September 28, 2000, the Federal Communications Commission ("FCC") released a Notice of Inquiry in *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket No. 00-185, 15 Commission Rcd 19287 (2000) to explore the issues surrounding high-speed access to the Internet over cable infrastructures. Specifically, the Commission sought comments from the public as to how cable modem service should be classified, *e.g.,* "telecommunication service," a "cable service," an "information service," or a hybrid of all three types.

In response to the *Notice of Inquiry*, Cross-Respondent, the Utility, Cable & Telecommunications Committee of the City Council of New Orleans ("CNO") filed Comments wherein it was asserted that (1) cable modem service should be classified as a "cable service;" and (2) cable operators should pay franchise fees on revenues derived from cable modem service.

On March 15, 2002, the FCC released its *Declaratory Ruling* and *Notice of Proposed Rulemaking*. The FCC concluded that the cable modem service is classified as an interstate information service and is subject to Commission jurisdiction. The Commission also determined that cable modem service is not a "cable service" as defined by the Communications Act. Additionally, the Commission declared that cable modem service does not contain a separate "telecommunications service" offering and is not subject to common carrier regulation. (FCC App. at 48a.)

Cross-Respondent originally filed its Intervention in the United States Court of Appeals for the District of Columbia Circuit, where venue was proper pursuant to 28 U.S.C. § 2343. The Judicial Panel on Multi-District Litigation consolidated all of the various petitions for

review in the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 2112(a)(3), and the D.C. Circuit transferred its case to this Court pursuant to 28 U.S.C. § 2112(a)(5). Subsequently, Cross-Respondent timely filed its Intervention in the D.C. Circuit on April 9, 2002, which was granted on May 14, 2002.

As described herein, Cross-Respondent challenges the conclusions reached by the FCC and the Ninth Circuit regarding the classification of cable modem service.

On October 6, 2003, the Ninth Circuit Court of Appeals rendered a decision adhering to its prior ruling in *AT&T v. City of Portland*, 216 F.3d 817 (9th Cir. 2000), under the doctrine of *stare decisis*, the court affirmed the FCC's ruling that cable modem service is not a cable service and vacated the ruling as it relates to the classification as a paid "telecommunications service." (FCC App. A)

ARGUMENT

Cross-Respondent, CNO, agrees with all Petitioners in this case that the classification of cable modem service under the Communications Act of 1934 presents an issue of exceptional public importance, which is deserving of this Court's consideration. Moreover, the Ninth Circuit failed to meaningfully review the merits of the arguments for the various possible classifications of cable modem service.

However, Cross-Respondent disagrees with the FCC's conclusion that cable modem service is not a cable service.

For the reasons stated herein, Cross-Respondent supports the Conditional Cross-Petition for Writ of Certiorari and respectfully request that it be granted if the FCC Petition in No. 04-281, the NCTA Petition in No. 04-277 or both are granted.

I. THE NINTH CIRCUIT ERRED BY AFFIRMING THE FCC'S CLASSIFICATION OF CABLE MODEM SERVICE.

The Ninth Circuit erred when it affirmed the FCC's decision to classify cable modem service as an "information service" and not "cable service" within the meaning of Title VI of the Communications Act. The intent of Congress, the definition of "cable service", and the statutory construction with other provisions of law, unambiguously demonstrate that cable modem service is a "cable service" under 47 U.S.C. § 522(6).

Cross-Respondent agrees with the Cross-Petitioners that the Ninth Circuit's review of the FCC's construction of the statutory term "cable service" should have been governed by the two-part test of *Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984). By choosing not to conduct a complete review under the *Chevron* standard, the Ninth Circuit failed to address the merits of the proper classification of cable modem service. (Cross-Pet. at 15.)

Moreover, Cross-Respondent supports the substance of the Cross-Petitioner's argument as they relate to the application of *Chevron* and joins all petitioners in their request that this Court engage in the appropriate *Chevron* analysis in the first instance, and not remand this case to the Ninth Circuit. This Court should rule on the substance of the proper classification of cable modem service and to consider the parties' briefs on the matter in determining this issue of exceptional public importance.

A. The FCC erred when it classified cable modem service as an "information service" and not "cable service" within the meaning of Title VI of the Communications Act, 47 U.S.C. § 522(6).

"Cable service" is defined as:

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. 42 U.S.C. § 522(6).

The terms "or use" were added into the statute in 1996, and the Commission had requested comments as to whether the addition of the words "or use" expanded the category of services such that cable modem service would now fit within the definition of cable service. *Notice of Inquiry* at ¶¶ 16. Furthermore, the Commission also sought comments on how classifying cable modem service as a "cable service" would affect a local franchising authority's ability to charge a franchise fee on revenues derived from the cable operator's cable modem service. *Id.* at ¶¶ 17.

Cross-Respondent contends that cable modem service is a "cable service" as defined in 47 U.S.C. § 522(6) and that local franchising authorities may charge a franchise fee of no more than five percent of the cable operator's gross revenues, including any revenues derived from a cable operator's cable modem service and/or cable modem platform pursuant to 47 U.S.C. § 542(b).

As stated above, the 1996 amendment to 47 U.S.C. § 522(6)(b) added the words "or use" into the definition of "cable service." The Conference Committee report states that the purpose of the amendment was to "reflect the evolution of cable to include interactive services, such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."[1] Clearly, the 1996 amendment, which added

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[1] H.R. Conf. Rep. No. 458, 104th Cong., 2d Ses. at 169 (1996).

"or use" was meant to include interactive and enhanced services into the definition of cable service.[2] Furthermore, "the 1996 amended definition of cable service is probably broad enough to encompass most Internet services." [3]

"Issues that hinge on the crucial definitional question [of cable service] include whether cable companies must pay franchise fees on revenues derived from providing Internet services." *In re Application of the United States of America for an Order Pursuant to 18 U.S.C. 2703(d)*, 36 F.Supp.2d 430, 432-433 (D. Mass, 1999). Specifically, 47 U.S.C. 542(b) provides that, for any twelve-month period, "the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."

One of the purposes of the revised definition of cable services was to enlarge the base of revenues upon which the cities could assess and receive franchise fees.[4] This is also supported by the statements on the House floor immediately prior to the passage of the 1996 Act, by Representative John Dingell, commenting on how the revised definition of cable services would affect local franchising authorities' revenues from cable franchise

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[2] *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998.

[3] Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy.* Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][a].

[4] 142 Cong. Rec. H1145-06 (Feb. 1, 1996) (statement of Rep. Dingell).

fees, "[t]his conference agreement strengthens the ability of local governments to collect fees for the use of public rights-of-way. For example, the definition of the term 'cable service' has been expanded to include game channels and other interactive services. This will result in additional revenues flowing to the cities in the form of franchise fees." [5]

In fact, Representative Dingell is not alone in his view that the purpose of the 1996 amendment was to broaden the definition of cable service so that municipalities could collect franchise fees on interactive services, *i.e.,* Internet via cable modem service;

- "A cable operator offering Internet as a cable service would be subject to franchising fees." [6]
- "Internet as a cable service is subject to franchising fees." [7]
- "The Telecommunications Act of 1996 expanded the definition of cable services to include interactive information and enhanced services made available to subscribers by the cable operator. Consequently, some municipalities may be in a position to require

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[5] 142 Cong. Rec. H1145-06 (Feb. 1, 1996) (statement of Rep. Dingell).

[6] Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy.* Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][b].

[7] Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy.* Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][b].

fee payments on a broader revenue base then that which is defined by the cable operator." [8]

- "If Internet-based services offered by cable operators over their systems are treated as cable services, they would become subject to any franchise fees imposed for cable services under the relevant franchise agreement." [9]
- The National Cable Television Association ("NCTA") has advocated that cable Internet-based services are not telecommunications services, and that the revenues gained through such services should be subject to the cable franchise fees authorized under section 622 of the Act. [10]

Without question, the 1996 Senate Conference Report and the remarks by Rep. Dingell indicate that it was Congress' intent to include cable modem service within the definition of "cable service." Thus, according to Congress, the 1996 amendment would now affect

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[8] McQuilline, Eugene, The Law of Municipal Corporations, Third Edition, 1995 Revised Vol. 12, Chap 34, Franchises § 34.37.20, 1996 Cumulative Supplement at p. 5.

[9] *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 92.

[10] *Communications Daily*, Oct. 9, 1997. (*Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 93.)

franchise fees because the definition of cable services has been expanded to include interactive services.[11]

Consistent with other changes recognizing the expansion of service offerings by cable operators, the 1996 Act also amended prior section 542(b) by inserting "to provide cable services" immediately before the period of the end of the first sentence, thus limiting the scope of the services on which cable operators must pay franchise fees with respect to any cable system to cable services only.[12] Moreover,

> Under revised section [542(b)], if Internet-based services offered by cable operators over their systems are treated as cable services, they would become subject to any franchise fees imposed for cable services under the relevant franchise agreement....The Telecommunications Act of 1996 expanded the definition of cable services to include interactive information and enhanced services made available to subscribers by the cable operator. Consequently, some municipalities may be in a position to require fee payments on a broader revenue base then that which is defined by the cable operator. [13]

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[11] *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 85.

[12] 47 U.S.C. 542(b).

[13] *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p.92-93, *quoting* McQuilline, Eugene, The Law of Municipal Corporations,

Clearly, the 1996 amendment to 47 U.S.C. § 522(6)(b), which defines cable service, indicates that the purpose of the 1996 amendment, in accordance with Congress' intent, was to include access to the Internet via the cable platform into the regulatory definition of "cable service" so as to enlarge the base of revenues upon which the cities could assess and receive franchise fees pursuant to 47 U.S.C. 542(b).

B. The FCC's *Declaratory Ruling* Renders a Provision of The Internet Tax Freedom Act Meaningless.

The Internet Tax Freedom Act also reveals Congress' intent to include cable modem service as a "cable service" thereby subjecting cable modem service to franchise fees. Furthermore, the subsequent passage of the Internet Tax Freedom Act in 1998 is relevant to ascertaining the Congress' intent when it passed the 1996 amendment that added the phrase "or use" to § 522(6)(b).[14]

In 1998, two years after Congress added the phrase "or use" to § 522(6)(b), Congress passed the "Internet Tax Freedom Act".[15] The Act placed a moratorium on taxes

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Third Edition, 1995 Revised Vol. 12, Chap 34, Franchises § 34.37.20, 1996 Cumulative Supplement at p. 5.

[14] *See, e.g., Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 840 (1988); *Grove City College v. Bell*, 465 U.S. 555, 567-68 (1984); *Cannon v. University of Chicago*, 441 U.S. 677, 686-88 n. 7 (1979); *Resolution Trust Corp. v. Miramon*, 22 F.3d 1357, 1363 (5th Cir. 1994).

[15] The Internet Tax Freedom Act, Pub.L. No. 105-277, Div. C, Title XI, §§ 1104 to 1108, Oct. 21, 1998, 112 Stat. 2681-719, *codified at* 47 U.S.C.A. § 151 note.

prohibiting any state or political subdivision from imposing a tax or fee on Internet access and electronic commerce, subject to certain exceptions. The statute further states that such a moratorium on Internet taxes "does not include any franchise fee or similar fee imposed by a State or local franchising authority pursuant to [47 U.S.C. 542(b)]." [16]

Again, 47 U.S.C. 542 states in pertinent part that a cable operator shall pay a franchise fee on the cable operator's gross revenues from the operation of the cable system to provide cable services.

Clearly, Congress believed (1) that "cable service," as defined by 47 U.S.C. § 522(6)(b), included access to the Internet over a cable system and (2) that revenues from Internet access provided by a cable service were subject to franchise fees. Consequently, Congress specifically excluded franchise fees from the Internet Tax Freedom Act, so that the right of municipalities to collect these fees would be preserved. If cable modem service was not a "cable service", then there would have been no need for Congress to refer to 47 U.S.C. 542 in the Internet Tax Freedom Act.

In the Internet Tax Freedom Act, Congress realized that a local franchising authority could charge a cable operator a franchise fee on its cable modem services (*i.e.*, Internet access). Therefore, Congress preserved the local franchising authority's right to collect such a fee and excluded the franchise fee from the moratorium on taxes relative to Internet access.

CONCLUSION

Cross-Respondent, the Utility, Cable & Telecommunications Committee of the City Council of

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[16] 47 U.S.C.A. § 151 note.

New Orleans respectfully requests that this Court grant the Conditional Cross-Petition in this docket if the Petitions for Writ of Certiorari in either 04-181 or 04-177 or both, are granted.

Respectfully submitted,

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